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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1959.

No. 346

MRS. GLADYS LEITH HOLMES,
Petitioner,

vs.

CONTINENTAL CASUALTY COMPANY, a Corporation, MUSGROVE INSURANCE AGENCY, a Partnership, Composed of W. T. Musgrove and W. R. Cadenhead, and W. T. MUSGROVE and W. R. CADENHEAD, Individually,
Respondents.

## PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Fifth Circuit.

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## PETITION FOR A WRIT OF CERTIORARI

**To the United States Court of Appeals for the Fifth Circuit.**

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on April 16, 1959.

## OPINIONS BELOW.

The judgment of the District Court (R. 790-791) is unreported. The opinion of the Court of Appeals (R. 819) is reported at 266 F. 2d 269.

## JURISDICTION.

The judgment of the Court of Appeals was entered April 16, 1959 (R. 845). Petitioner filed her application for rehearing on May 6, 1959. It was denied on May 28, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

## QUESTIONS PRESENTED.

1. Where petitioner was assured of a trial by jury in the state courts of Alabama, can a Court of Appeals in a diversity case, deny petitioner a jury trial by refusing to apply the state scintilla of evidence rule and substitute therefor a more stringent federal test, thereby depriving petitioner of the benefit of the verdict of the jury and the action of the trial court in refusing to set aside that verdict?

2. Was the evidence in this record sufficient to support the verdict of the jury as found by the trial judge and was petitioner effectively denied a trial by jury in violation of the Seventh Amendment of the Constitution by the action of the Court of Appeals in directing judgment for respondent on the ground that the evidence was not sufficient to support the jury's verdict?

## STATUTES INVOLVED.

The Seventh Amendment of the United States Constitution is involved:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Tit. 9, Secs. 68, 69, 73, of the Alabama Code, 1940, are involved. These Sections are printed in Appendix A.

## STATEMENT.

This case was commenced in the United States District Court for the Northern District of Alabama. Federal jurisdiction rested on diversity of citizenship, 18 U. S. C. 1332.

Mrs. Gladys Holmes, petitioner, sued respondent, Continental Casualty Company, for the proceeds of an accident and health policy insuring the life of her deceased husband, Oliver Wendell Holmes, while flying as a pilot. Mrs. Holmes claimed that coverage was effected by oral binder communicated by respondent's agent, W. T. Musgrove, and that her husband relying on the oral binder piloted an airplane which crashed causing his death. Musgrove, respondent's licensed agent, admitted that he made the oral binder as claimed by petitioner (R. 127, 217, 230). Respondent's principal defense was lack of authority of its agent Musgrove to bind it. There was no written agency contract between respondent and Musgrove.

Respondent impleaded as third party defendants the Musgrove Insurance Agency and the two partners individ-

nally, alleging that none of the third-party defendants had actual authority to make the oral agreement insuring Holmes and, therefore, if respondent was liable to petitioner because of any apparent authority, then the third-party defendants were in turn liable to respondent.

The verdicts of the jury were in favor of petitioner, for the amount of the policy, $50,000, and in favor of the third party defendants. Trial Judge Hobart Grooms refused to set the verdict aside, entering judgment for petitioner.

The Court of Appeals reviewed the evidence and held that there was "no substantial evidence that Musgrove had either actual or apparent authority to orally bind Continental Casualty Company" 266 F. 2d at 276. It thereupon reversed and remanded with directions to enter judgment for respondent.

The binder in suit was not given by Musgrove until 1957. It covered Holmes while piloting an aircraft. In order to understand Musgrove's authority—both actual and apparent—if is necessary to state the facts concerning the original coverage issued through Musgrove by Continental insuring Holmes as a passenger in an aircraft.

In early 1956, petitioner's husband contacted Musgrove, owner of Musgrove Insurance Agency of Florence Alabama, relative to his insurance needs. Holmes executed an application for a $50,000 Aviation Accident Policy on a form provided by Queen Insurance Company for which Musgrove was an agent. This application was forwarded to the Atlanta office of Queen Insurance Company. Because this company already had considerable exposure under a policy covering the aircraft identified in the application, the representative in Atlanta sought to place the insurance with another company.

Herbert Holland, Jr., manager of respondent's southeastern branch office, was contacted. He talked by tele-

phone with Musgrove in February, 1956, and in the course of their conversation Holland stated that insurance coverage for Holmes in the amount of $50,000 was "then in effect with Continental Casualty" (R. 187). Following this telephone conversation, Musgrove told Holmes that he was insured with respondent for $50,000 (R. 191). Subsequent to the telephone conversation, Holland wrote a letter to Musgrove dated February 23, 1956, advising that Continental was holding "on binder" aviation accident coverage in the amount of $50,000 for Holmes and another applicant, James Culver, while riding "as passengers" in identified aircraft (R. 42). The letter stated that the insurance was "effective February 17, 1956" and requested that the enclosed Continental application blanks be completed and returned. It was February 27, 1956, before Musgrove had the applications executed and returned to Holland. It was mid-May of 1956 before the policies were issued. As respondent conceded this original insurance was held "on oral binder" (R. 181).

Holland appointed Musgrove "a full agent for the aviation accident division, special risk department, of the Continental Casualty Company to secure business in Florence, Alabama" (R. 202. Emphasis added). He also told Musgrove that he as to receive a full agency commission on all insurance and that Continental's insurance would be handled like all of Musgrove's other business (R. 203).

This reference to Musgrove's appointment as a "full agent" and handling Continental's insurance like all of Musgrove's other business is particularly significant because respondent was aware at the time that Musgrove was general agent for other insurance companies. See respondent's answer to interrogatory No. 16 (R. 274).

Musgrove was not a licensed agent of respondent at the time respondent insured Holmes by its oral binder

on the original passenger insurance. Respondent mailed the Holmes and Culver policies direct to Musgrove without countersignatures of a licensed resident agent as is required by Alabama law. After a delay of approximately three months, respondent procured an Alabama license naming Musgrove an agent of Continental Casualty Company with Power 4, "Miscellaneous casualty, including official surety bonds". Power 12 on this form was one for "a solicitor", but respondent in procuring Musgrove's license from the Alabama Department of Insurance checked Power 4—the highest power capable of being indicated on the form furnished by the Department (R. 98, Pl's Ex. 5). On May 28, 1956, respondent sent Musgrove his agent's license from the Department of Insurance. Musgrove then countersigned the Holmes policy and delivered it to Holmes. Thus, from February 17, 1956, until some time in late May, Holmes was insured with respondent by an oral binder, the knowledge of the binder being communicated to him orally by Musgrove.

Musgrove's authority to bind the defendant as a General Agent or his implied authority to bind the defendant was shown by many documents discovered by motion to produce. For example, Holland, respondent's Southeast Branch Manager, initiated the application to license Musgrove as respondent's agent in Alabama. On that application Holland described Musgrove as a "General Agent" (R. 486, Pl's Ex. 13).

Also discovery produced a letter (R. 579) from Holland to the Musgrove Insurance Agency saying:

> "The most practical solution is for us to acquire for you an Accident and Health License with the Continental Casualty Company. **This would permit the signature on the above two policies to stand.**" (Emphasis added.)

The two policies were in evidence (R. 46, 47, and 48) showing that the signatures mentioned referred to Musgrove's act in countersigning policies issued in Alabama.

After respondent had applied for a license for Musgrove with the Alabama Department of Insurance, Holland wrote Musgrove:

> "Please be assured that we intend **in all ways to honor your Continental licensing** and we want to do as much business with you as possible . . . My personal division, Aviation, encompasses all kinds of specialties and travel risks . . . I hope that I shall be hearing from you regularly." Emphasis added (R. 209).

On Dec. 10, 1956, Musgrove wrote Holmes a letter concerning Holmes' policies in force. This letter stated in part:

> "Aviation Accident Policy which should be rewritten since you are flying a plane by yourself; this is written on a passenger basis, and not as pilot, but you should have this changed to cover you as pilot of the plane, and I would appreciate your considering this and agreeing to change it. It will cost you more money but will give you the protection that is needed. This policy was charged to Pressure Concrete Company of Florence, and I think in all fairness, and I am sure you agree, that we should transfer this over to your account. Will appreciate very much your discussing this with me the next time we get together" (R. 89).

Musgrove had a conversation with Holmes on Jan. 3, 1957, in which Holmes told Musgrove that he wanted aviation accident insurance covering him as a pilot, and Musgrove told Holmes that he was covered from then on.

Musgrove made a notation reading: "Wendell Holmes Aviation Pilot (sic) . . ." and testified that he gave the memorandum to his partner Billy Cadenhead, for processing and getting the policy endorsed or a new one issued, whichever was necessary (R. 125, 126).

The next day, January 4, 1957, Cadenhead wrote Continental stating that Holmes wished to have "pilots coverage" under the $50,000 policy presently in force and requested necessary applications to complete the matter (R. 149, Def's Ex. 4).

After receipt of Cadenhead's letter, respondent through its representative Holland, replied as follows (R. 50):

"Oliver Wendell Holmes

AA-108708

"Dear Mr. Cadenhead:

"We will be delighted to entertain Mr. Holmes' (sic) application for Pilot Coverage. I am enclosing another application which we would like to have him complete and also a Pilot History Form which ~~also~~ must be submitted.

"Depending upon Mr. Holmes' experience and needs of the insurance, it is possible that our underwriters would not like to write as much as $50,000 principal sum for piloting. Completion of these two forms will help to determine this. If he should need only $25,000 while piloting, or that is all that could be written, we would be able to reduce the principal sum under the present policy to $25,000. All the present coverage is included in the Pilot Policy, so that he would have $50,000, just as he now has with $25,000, piloting. Of course, this is all problematical.

"Please let me know if I may be of further help."

After Cadenhead received the application and forms, he partially filled them in and delivered them to Holmes. On the night of February 20, 1957, Holmes brought the application and forms to Musgrove and signed them (R. 231). At that time Holmes referred to a statement in the form that coverage was not effected until the policy was issued and asked Musgrove if coverage was not actually in effect, explaining to Musgrove that he was flying daily (R. 230). Musgrove assured Holmes that the statement made no difference because Holmes was "under binder and it was just a matter formality of getting the document or the Policy to him" (R. 230).

The next day, Feb. 21, Holmes was killed flying as a pilot, having been orally assured of coverage by the same agent for respondent who gave him oral assurance of coverage on the prior policy, which admittedly was in force for more than three months on oral binder (R. 210).

Cadenhead took the application and pilot's history form to Atlanta on Feb. 25, and there met with Holland. Cadenhead testified that he told Holland on this occasion that Musgrove had told Holmes that Holmes had "the coverage" and that Holland did not then deny that Musgrove had the authority to bind Holmes (R. 661, 664).

There was no evidence in the entire record of any affirmative directive by respondent to limit the authority of Musgrove. Respondent had no agent in the State of Alabama superior to Musgrove (R. 121, 122).

## REASONS FOR GRANTING THE WRIT.

### I.

This case involves an important question about which there is a conflict in the Courts of Appeal in the various circuits. The Court of Appeals for the Fifth Circuit in

this diversity case has applied a federal test to determine whether the evidence was sufficient to support a jury verdict. As stated by the Court of Appeals, the test of sufficiency which it applied was whether there was **"any substantial evidence"** which supported the verdict (Emphasis the Court's). 266 F. 2d at 276. In footnote 5 of the Court's opinion and as authority for the proposition that the sufficiency of the evidence is measured by a federal test, the Court of Appeals cited one of its prior cases, **Reuter v. Eastern Air Lines** (5 C. A.), 226 F. 2d 443, 445.

In the **Reuter** case the author of the **Holmes** opinion stated:

> "In diversity cases, therefore, even since Erie, the scintilla of evidence rule prevailing in Alabama and in some other states has no application in the federal courts."

In the recent opinion of this Court in **Dick v. New York Life Insurance Co.**, 359 U. S. 437, 445, this Court acknowledged that "the lower courts are not in agreement" on this question. This Court cited **Rowe v. Pennsylvania Greyhound Lines** (2 C. A.), 231 F. 2d 922; **Cooper v. Brown** (3 C. A.), 126 F. 2d 874; **Lovas v. General Motors Corp.** (6 C. A.), 212 F. 2d 805, as representative of holdings by three of the Circuits that in diversity cases the sufficiency of the evidence is to be determined by a state test.[1] This Court then cited cases from three Circuits including the **Reuter** opinion from the Fifth Circuit for the conflicting view.

These conflicting opinions in the Circuit Courts cite decisions of this Court as authority for their irreconcilable

[1] Two other circuits appear committed to the view that federal courts in diversity cases will apply a state test to determine the sufficiency of the evidence. *Kyker v. Kyan* (7 C. A.), 126 F. 2d 952; *Twin City Hardwood Lumber Co. v. Dreger* (8 C. A.), 199 F. 2d 197.

views. For example, in this case, the Court of Appeals cited **Myers v. Reading Co.** (1947), 331 U. S. 477, 485, for the proposition that the sufficiency of the evidence is to be judged by a federal test. In **Gutierrez v. Pub. Service Interstate Transp. Co.** (2 C. A.), 168 F. 2d 678, the Court of Appeals for the Second Circuit relied on **Stoner v. N. Y. Life,** 311 U. S. 464, for the proposition that the sufficiency of the evidence is determined by state law.

In the **Dick** case, this Court declined "to reach out to decide this important question" because (1) the Court of Appeals "appears to have applied the state standard," and (2) in "the context of this case, the two standards are substantially the same," and (3) in briefs and arguments both parties "assumed that the North Dakota standard applied." **Dick v. N. Y. Life Ins. Co.,** 359 U. S. 437, 445.

In the instant case, the Court of Appeals, by citing the **Reuter** opinion made emphatically clear that it rejected "the scintilla of evidence rule prevailing in Alabama." We will not detail here the evidence that abundantly satisfied the scintilla rule. In the second section of this petition, we will endeavor to show not only that the evidence met the scintilla test, but that the evidence was substantial enough to meet any recognized federal test for determining the adequacy of the evidence. We believe the Court of Appeals in the instant case not only erroneously refused to follow **Erie,** but in its refusal to permit the jury to resolve the conflicting evidence and inferences therefrom actually infringed rights of petitioner guaranteed by the Seventh Amendment. The Court of Appeals does not even suggest that the jury's verdict lacked the scintilla of evidence required by Alabama practice.

The reverse is true. By citing the **Reuter** case, the **Holmes** court properly suggests that if it had been ap-

plying the state scintilla rule it would have been forced to a different conclusion. The author of the **Holmes** opinion, a longtime Alabama practitioner, presumably was aware of the power of the scintilla rule in preventing Alabama courts from denying litigants trial by jury.

The Supreme Court of Alabama recently had occasion to express forcefully the limitation on its review of the sufficiency of the evidence.

> "In view of the rule in Alabama that in civil cases the question must go to the jury if the evidence or the reasonable inferences arising therefrom furnish 'a mere gleam, glimmer, spark, the least particle, the smallest trace, a scintilla' in support of the theory (Ex parte Grimmett, 228 Ala. 1, 152 So. 263), we are constrained to hold that the question of contributory negligence was for the jury and that there was no error in refusing the affirmative instructions requested by the defendant." **Ala. Great So. R. R. v. Bishop**, 265 Ala. 118, 89 So. 2d 738, 743.

In **Liverpool & London & Globe Ins. Co. v. McCree**, 213 Ala. 534, 105 So. 901, 904, the Supreme Court of Alabama stated:

> "The making of insurance contracts, oral and written, was discussed on former appeal. 210 Ala. 559, 98 So. 880. The burden of proof is the same, whatever the nature of such insurance contracts. The scintilla of evidence is the rule that prevails in this state; and, if there is evidence or inference therefrom unfavorable to the party requesting the general affirmative charge, it should be refused."

And see: **Cleveland Laundry Mfg. Co. v. Southern Steam Co.**, 204 Ala. 297, 85 So. 535; **Chesser v. Williams**, ... Ala. ..., 104 So. 2d 918; **U. S. Steel v. Matthews**, 261 Ala. 120, 73 So. 2d 239.

The circumstances which required this Court to stay its hand in the **Dick** case are not present here. A federal appellate court has here concededly applied a federal test different than the state test and has thereby deprived petitioner of the trial by jury assured to her by the rule of the Alabama courts.

We do not argue at length in this petition whether the view of the Fifth, Fourth and Tenth Circuits is correct, or that of the Second, Third and Sixth. See **Dick v. N. Y. Life**, 359 U. S. 437, 445. Extended argument seems more appropriate for brief in the event this Court agrees that this important question is now proper for review.

Petitioner submits, however, that the teachings of **Guaranty Trust Co. v. York**, 326 U. S. 99, reject the view that in diversity cases there is a different rule in the federal courts for determining the sufficiency of the evidence than would apply to the same litigants in the state court.

> "In essence, the intent of that decision **(Erie)** was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court. *The nub* of the policy that underlies Erie R. Co. v. Thompkins is that for the transaction the accident of a suit by a non-resident litigant in a federal court instead of a state court a block away should not lead to a substantially different result." **Guaranty Trust Co. v. York**, at p. 109.

By measuring the scope of its review by a "federal test" to the rejection of the state test, the Court of Appeals has denied petitioner the trial by jury that was guaranteed to her under the state practice. By way of understatement

"the outcome of the litigation in the federal court" was not "substantially the same."

In the recent case of **Byrd v. Blue Ridge Cooperative**, 356 U. S. 525, this court strongly suggested that in the absence of "countervailing considerations" the federal court in diversity cases should follow state law in determining whether judge or jury resolved the issues. This Court stated:

> ". . . were 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow the state practice," at p. 537.

In the **Byrd** case this Court found such "countervailing considerations" in "the federal policy favoring jury decisions of disputed fact," at p. 537.

In the instant case these two considerations (1) having "the outcome" the same in state and federal courts and (2) having a jury decide disputed facts, can be served only by granting petitioner in this diversity case the jury trial she was assured of having in the state court. Thus, the considerations in conflict in **Byrd** are here in harmony and require that this case be reversed.[2]

The case of **Stoner v. New York Life**, 311 U. S. 464, also seems to require that the test of the sufficiency of the evidence in diversity cases be the same in federal and state courts. The **Stoner** case is so treated by Courts of Appeal in at least three of the circuits. **Rowe v. Penn. Greyhound Lines** (2 C. A.), 231 F. 2d 922, 924; **Sierocinski v. E. I. Du Pont De Nemours & Co.** (3 C. A.), 118 F. 2d 531, 535;

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[2] In Green, *Protection of Jury Trial in Diversity Cases Against State Invasions*, 35 Texas L. Rev. 768, the author notes the consistent efforts of this Court to prevent local practices designed to deprive a litigant of his constitutional right to jury trial. And see *Beacon Theatres v. Westover*, ... U. S. ..., 79 S. Ct. 948, 952.

**Lovas v. General Motors** (6 C. A.), 212 F. 2d 805, 807. Despite the **York, Byrd** and **Stoner** cases, the different circuits are in square conflict. This Court should clearly decide this important question. Alabama courts bound by the scintilla rule would not have deprived petitioner of a jury trial. Petitioner should not be deprived of her judgment because of "the fortuitous circumstances of residence out of a State of one of the parties." **Guaranty Trust Co. v. York**, 326 U. S. 99, 112. Nor should she be deprived of her judgment because of "the fortuitous circumstances" that this case arose in the Fifth rather than in the Second, Third, Sixth, Seventh or Eighth Circuits. The important question which this Court would not "reach out" to decide in the **Dick** case is here squarely presented and should be resolved in favor of petitioner.

II.

In the foregoing section we pointed out that a scintilla of evidence should have been sufficient to protect petitioner's right to trial by jury. In this section we will show that not only was there such a scintilla of evidence, but that there was an abundance of probative evidence, more than sufficient to satisfy the "federal" standard purportedly applied by the Court of Appeals.

By reversing the trial court and rendering judgment for respondent despite petitioner's evidence, the Court of Appeals effectively deprived petitioner of her right to trial by jury in violation of the Seventh Amendment. This Court has recently re-avowed its determination to protect this right of trial by jury from any evasion.

> "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scruti-

nized with utmost care." **Beacon Theatres v. Westover**, . . . U. S. . . ., 79 S. Ct. 948, Quoting, **Dimick v. Schiedt**, 293 U. S. 474, 486.

When Courts of Appeals have encroached upon the jury's function by rendering judgments or granting new trials in the face of contrary jury verdicts, this Court has reproved such action by granting certiorari, and reversing on that point alone. E. g., **Dick v. New York Life Ins. Co.**, 359 U. S. 437; **Byrd v. Blue Ridge Cooperative**, 356 U. S. 525; **Swafford v. Atlantic Coast Line R. Co.**, 350 U. S. 807, a per curiam reversal; **Gibson v. Phillips Petroleum Co.**, 352 U. S. 874, a per curiam reversal. See also, Green, **Protection of Jury Trials Diversity Cases**, 35 Texas L. Rev. 768. As this Court stated in **Byrd v. Blue Ridge Cooperative**, supra, 356 U. S. at 537:

> "The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury."

The Court of Appeals correctly stated the three legal theories upon which petitioner proceeded to trial, i. e., Musgrove's actual authority as a general agent, Musgrove's actual authority as a lesser agent with power to orally bind the respondent, and Musgrove's apparent or ostensible authority to orally bind the respondent. After stating these theories, the Court of Appeals held that ". . . . there was no substantial evidence that Musgrove had either actual or apparent authority to orally bind Continental Casualty Company" 266 F. 2d at 276. The Court of Appeals listed items of evidence upon which the jury relied in reaching its verdict and proceeded syste-

matically to discount this evidence by giving strained and speculative inferences and intendments to it. In short the Court of Appeals retried the case on the printed record and reached a different conclusion than the jury who had heard the testimony. It, therefore, substituted its determination of the factual questions for that of the jury and reversed the trial judge who had held the evidence sufficient to support the verdict of the jury.

By its action in this case, the Court of Appeals must have been convinced by respondent that some superlative proof is required in an action on an oral binder or oral contract of insurance. Such is not the case. **Liverpool & London & Globe Ins. Co. v. McCree**, 213 Ala. 534, 105 So. 901, 904. It is common business practice for life, health and accident, and fire insurance companies to insure by oral binders. This practice gives substantial benefits to both insurer and insured.[3] Since the insurance companies started the practice of binders, it is not fair to allow them to claim the advantages while rejecting the burdens.

Since it is undisputed that respondent never even attempted to execute a written agency contract with Musgrove, and since it is also undisputed that Musgrove was respondent's agent and attempted to insure Holmes by oral binder (R. 230), the single issue in this case was the authority of respondent's agent Musgrove in the absence of written contract to bind respondent.

We will briefly recite the evidence which supported each of petitioner's three theories of recovery.

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[3] For a thorough discussion on this subject, see "Binding Receipts," 60 Harv. Law Rev. 1164. For representative cases discussing the agent's authority to orally bind the company, see *Sun Ins. Office of London v. Mitchell*, 186 Ala. 420, 65 So. 143; *Bankers & Shippers Ins. Co. of N. Y. v. Blackwell*, 260 Ala. 463, 71 So. 2d 267; *Liberty Nat. v. Hamilton*, 237 F. 2d 235 (6 Cir.).

### 1. Actual Authority as a General Agent.

The law is clear that if Musgrove was a general agent of respondent, respondent would then have been bound by any contract of insurance made by such general agent. E. g., **Nat. Life & Accident Ins. Co. v. Claytor,** 254 Ala. 413, 48 So. 2d 180; **American Life Ins. Co. v. Carlton,** 236 Ala. 609, 184 So. 171.

We will outline the evidence which abundantly supported the conclusion that Musgrove was Continental's general agent.

A. In his original application on February 3, 1956, for a $50,000 passenger aviation accident coverage Holmes was covered by Continental "on oral binder" (R. 184) from February 17, 1956, until the policy was issued in mid-May, 1956—a period of three months. Continental orally communicated to Musgrove that Holmes was covered by oral binder. Musgrove orally communicated this fact to Holmes with the authority and approval of Continental. Continental issued its oral binder on the passenger insurance six days before Musgrove was provided with Continental's application forms and more than ten days before the executed forms were returned to Continental (R. 42).

B. In Holland's telephone calls to Musgrove in March or April of 1956, Holland requested permission to license Musgrove as an agent of Continental for the State of Alabama, which permission was given. In this conversation Holland told Musgrove he was to write "the highest limit" of coverage, would do business directly with the Atlanta branch office of Continental, and would receive a "full agency commission" (R. 202).

C. In the same conversation Holland told Musgrove that he wanted Musgrove to handle Continental's busi-

ness like all his other business (R. 203). Respondent was aware that Musgrove was general agent for other insurance companies. See respondent's answer to interrogatory No. 16 (R. 274).

D. Holland told Musgrove in the same telephone conversation that Musgrove would be its "full agent for the aviation accident division, special risk, department" (R. 202).

E. In Holland's letter to Cadenhead on April 30, 1956, Holland stated that Musgrove's license "would permit the signatures on the above two policies to stand" (R. 579).

F. In Holland's letter to Cadenhead on May 7, 1956, he stated: "Please be assured that we intend in all ways to honor your Continental licensing, and we want to do as much business with you as possible and help you in all ways. As you doubtless know, the Continental Casualty Company issues more policies for more different types of risks than any other company, and in the Accident and Health business of stock companies, the Continental Casualty Company is larger than the rest combined . . ." (R. 208, emphasis added).

G. Musgrove's license from the Superintendent of Insurance of the State of Alabama listed him as an agent of Continental with Power 4; "Miscellaneous casualty, including official surety bonds". This was the highest power indicated on the form (R. 98, Pl's Ex. 5). Even though Power No. 12—"Soliciting Agent"—was not checked, respondent contended that Musgrove was at most a soliciting agent.

H. In Holland's request to Continental's general office in Chicago to license Musgrove as its Alabama agent, Musgrove was listed as an "agent" licensed to sell "accident & health" insurance who would

"report business through" the "Musgrove Insurance Agency" as the "**General Agent or Agency**" (R. 486, Pl.'s Ex. 13, emphasis added).

I. Musgrove had no superior in the State of Alabama (R. 121, 122).

J. Holland admitted that Musgrove had authority to issue Continental's individual trip accident policies without prior approval of Continental (R. 276, respondent's answer to interrogatory No. 16-b).

K. Holland testified that Continental policies issued in Alabama would not be valid unless countersigned by Musgrove (R. 601).

L. On February 25, 1957, four days after Holmes' death, Cadenhead told Holland that Musgrove had assured Holmes that he was insured as a pilot. Holland's silence and failure to deny Musgrove's authority at this time was much more than an inference that Musgrove was a general agent possessed of the power to orally bind Holmes (R. 661, 664).

Together, these items constitute much more than substantial evidence, they approach a "great preponderance" of the evidence that Musgrove was a general agent of Continental. In the absence of a written agency contract, how could the evidence of general agency have been any stronger than that presented by petitioner? We respectfully submit that the evidence briefly detailed herein shows that there were many "written or oral words or other conduct of Continental Casualty Company which, reasonably interpreted, caused Musgrove to believe that Continental desired him to act on Continental's account as a general agent" 266 F. 2d at 281.

However, the Court of Appeals, instead of applying its earlier stated "substantial evidence" test, listed many of

the above items of evidence and then proceeded to reweigh and discount this evidence in an attempt to show that it was not "substantial." For instance consider the Court of Appeals' treatment of Plaintiff's Exhibit No. 13 which was obtained by discovery. This document was Holland's request to Continental's General Office for Musgrove's license as as Alabama agent and it stated in par. 8 that the "applicant will report business through" the "Musgrove Insurance Agency" as the **"General Agent or Agency."** (Emphasis added.) In refusing to give any probative value to this admission of general agency by respondent, the Court stated:

> "Holland testified unequivocally that the information under paragraph 8 was for the sole purpose of identifying any business produced by Musgrove as belonging to the Atlanta Branch Office . . . the only manifest purpose of the instrument was a request to license an agent" 366 F. 2d at 279-280.

Respectfully, this treatment is beyond our comprehension. Here, the Court is making evidence disappear. By some new judicial alchemy, the Court is saying what was evidence is not evidence any more. The Court says that because of Holland's "unequivocal" testimony, the characterization of Musgrove as a "General Agent" is not substantial evidence. The sole purpose of Holland's testimony was to impeach and explain away the writings on the instrument. The jury, not the appellate court, heard Holland testify—the jury and not the Court of Appeals is properly the judge of his credibility. By such a review the Court of Appeals is not applying the federal test of substantial evidence, it is applying a new and unlimited appellate technique for taking a case from the jury. Since Musgrove considered himself a general agent of Continental, the explosive effect of Plaintiff's Exhibit No. 13 was to show that **Continental too had considered Mus-**

**grove as a general agent.** Because the Court of Appeals considered the conflicting evidence of Holland "unequivocal" on a reading of the cold record does not erase the written admission from evidence, nor is it usual that an admission to constitute evidence, be made with any "manifest purpose" to be used in evidence by the other side.

After discussing the telephone conversation in which Holland commissioned Musgrove as a "full agent . . . to secure business" and to write "the highest limit" of coverage with a "full agency" commission (R. 202), the Court stated:

> "The term 'full agent' can only be reasonably construed as bringing into existence the status of principal and agent . . . ," 266 F. 2d at 278.

In other words by ignoring or striking the word "full." The Court has done the same thing by "reasonable construction" as judicially deciding that the witness did not say "full agent," or "construing" the words "general agent" by striking the word "general." Open that door and leave it open and jury trial is a dead ritual with its heart cut out on the altar of "judicial construction." We could not suggest an expression more amply entitling the jury to find that Holland gave Musgrove full authority than the expression used by Holland to describe that agency.

After discussing Musgrove's agency license from the State of Alabama conferring on him the highest power provided on the form, "Power 4—Miscellaneous Casualty, Including Official Bonds," the Court concluded:

> "Summarily, this certificate 'is only evidence of the agency in some form.'" (Citing cases.) 266 F. 2d 278.

But the Court did not mention the failure of respondent to check Power 12 on the license form, which was that

of "soliciting agent". Since respondent contended throughout this litigation that Musgrove was no more than a "soliciting agent," it is "mildly" inconsistent that on the form licensing Musgrove as its Alabama agent, it did not check Power 12—this precise designation—but selected the broadest designation possible.

After discussing Musgrove's undisputed authority to issue, by oral binder or otherwise, individual trip accident policies, the Court stated:

> "Even had Musgrove received and made out these policies, it would not be evidence of general agency. These policies required no formal underwriting and would not, of course, have covered flying as a pilot or crew member." 266 F. 2d at 280.

But why would not the power to issue these trip policies be "substantial" evidence of the power to issue policies covering pilot or crew members? The fact is both these policies covered insureds **while flying**. Other policies, such as the one in question, covered pilots or crew members **while flying**. The court is saying that Musgrove was a general agent for one type of flying while a limited agent for another. This is similar to saying that evidence showing that one had power as a general agent to insure traveling salesmen is not substantial or probative in order to show power to insure local salesmen. The Court cites no authority for its distinction between the power to issue one type of policy and another. Perhaps the fact that Musgrove had the undisputed power to issue certain types of insurance does not compel the conclusion that he had the authority to issue the policy in suit. But in the absence of any limitation on his authority, it is certainly a reasonable conclusion. Continental never articulated the distinction made by the Court of Appeals to Musgrove or anyone else so far as this record shows until after Holmes' death.

After the court discussed the fact that Holmes was under oral binder for about three months with Continental without his application ever having been processed, the Court summarily stated:

> "The Company accepted the risk here. Further, Musgrove was not an agent of Continental Casualty Company on February 17, 1956." 266 F. 2d at 280.

We fail to understand the Court's logic in the quoted statement. First, certainly "the company accepted the risk here"—But it did it by oral binder—and it communicated the information relative to this oral binder by and through Musgrove.

Second, there was nothing significant about the date February 17, 1956. This was simply the date to which Continental made the Holmes' insurance coverage retroactive. Continental actually accepted the risk of February 23, 1956, which was the date that Musgrove was appointed an agent of Continental. Musgrove did every act of an agent relative to this insurance from solicitation to collection and transmittal of the premiums to Continental. The fact that his appointment was on the date Continental accepted the risk rather than the date it selected for premium purposes seems irrelevant.

Continental failed to have a written contract of agency with Musgrove. It designated Musgrove "a general agent" on its interoffice memorandum which petitioner obtained by discovery. On the licensing form provided by the State of Alabama, Continental checked the broadest power possible for Musgrove and omitted to check Power 12, "soliciting agent". It referred to Musgrove as a "full agent". It advised Musgrove that it wanted him to handle Continental's business like all his other business, knowing that Musgrove was a general agent for other insurance companies. Its agent believed that he had the powers of a general agent and so acted. But

the Court of Appeals stated that the totality of these facts coupled with the other evidence herein discussed was insufficient to permit it to allow the verdict of the jury and the judgment of the trial court to stand.

In the absence of a written contract, we fail to see how evidence could be stronger to support general agency in a disputed case. No evidence is strong enough by any rule, state or federal, to uphold a jury verdict, if the appellate court can set out the evidence and then in the name of "reasonable construction" or considering its "manifest purpose", denaturalize it as evidence and disregard it. The Court of Appeals has used an approach to the sufficiency of the evidence test that would forever free appellate courts from "unwise or unwanted" jury verdicts. "The curtailment of the right to a jury trial" manifest in this case requires the attention of this Court.

## 2. Actual Authority as An Agent Below a General Agent.

As the Court of Appeals stated: "an agent . . . may also be less than a general agent (such as a soliciting agent) and have actual authority to bind the company by oral binders or contracts in certain types of insurance." 266 F. 2d at 277-278.

But the court in applying its strange standard of review, brushed aside the possibility that Musgrove could be less than a general agent (as understood in insurance law) and still have actual authority to issue oral binders or contracts on the type of insurance in question.

We will not burden this Court with a detailed discussion of the evidence that supported Musgrove's actual authority. Most of this evidence has been itemized in the section of this brief discussing Musgrove's general agency.

A reference to this itemized evidence at pages 18 through 20 will demonstrate that there was substantial evidence to support petitioner's theory of actual authority.

### 3. Apparent or Ostensible Authority.

Again we quote the Court of Appeals statement of law that "it is elementary that, before a principal may be bound by its agent's apparent or ostensible authority, the person dealing with the agent must have relied on the appearances in some way to his detriment." 266 F. 2d at 282. But we cannot comprehend the Court's conclusion based on this statement that:

> ". . . in the case at bar, there was clearly no factual basis for the trial court to submit to the jury the question of apparent or ostensible authority Musgrove, for the reason that there was no holding out by Continental Casualty Company of Musgrove as an agent authorized to make contracts of insurance." 266 F. 2d at 282.

Respondent more than held out to Holmes that Musgrove had apparent authority to issue oral binders. It was through Musgrove that Holmes was orally insured for flying as a passenger from February 17, 1956, until February 27, 1956, at which time Holmes filled out Continental's application and it was through Musgrove that Holmes was given oral coverage as a passenger from February 27, 1956, to mid-May, 1956. The only assurance of any coverage for Holmes during all of this period of three months was the oral assurance of Musgrove, which Continental authorized Musgrove to give. We can think of no stronger "holding out" to Holmes than this. And certainly Holmes relied to his detriment on this "holding out" since he flew as a pilot and met his death after Musgrove's assurance that he was covered as a pilot in the same way that he had been covered as a passenger the

year before. It would have been unusual in the extreme for Holmes to challenge Musgrove's authority to orally bind him as a pilot, when, with Continental's approval, Musgrove had orally bound him as a passenger and had accepted Holmes' premiums during the full three months of the prior oral binder.

### 4. Denial of New Trial.

We earnestly submit that the evidence in this case is abundantly sufficient to meet either the state or "federal" test for sufficiency of the evidence. If we have failed to convince this Court of that fact, this case requires corrective action for yet another reason. The Court of Appeals deprived plaintiff of a jury trial by ordering judgment to be rendered for defendant instead of ordering a new trial.

The point here is not to dispute the general power in a proper case to reverse and render under Rule 50 (b), although it is contrary to the wise principles announced in Barrow and Hotzhoff, **Federal Practice and Procedure**, Vol. 2, pp. 777-8, derived from **Cone v. West Virginia Pulp & Paper Co.**, 67 S. Ct. 752, 330 U. S. 212, 67 S. Ct. 752, motion denied 67 S. Ct. 1090, 330 U. S. 813, motion denied 67 S. Ct. 1125, 331 U. S. 794.

The order in this case was based upon an egregious and manifest error of logic. Failure to correct it means irrevocable loss of petitioner's case upon a naked mistake in reasoning.

In oral argument this illustration was used: A plaintiff sues a railroad and the engineer in a case where only the engineer could have been negligent. In Alabama a verdict for the engineer is inconsistent with a verdict against the railroad. By false analogy, in its opinion, the Court of Appeals said:

> "The verdicts of the jury were in favor of the plaintiff, assessing her damages at $52,750.00 and in favor of third party defendants. **Necessarily** therefore, the jury found that the agents had actual authority." 266 F. 2d at 271-272.

But it does not follow that the jury did **not** find that Musgrove had apparent authority, also. And plaintiff was entitled to recover in full if Musgrove had apparent authority even if he did not have actual authority. Ala. Code, 1940, Title 9, §§ 68, 69, 73.

Yet the judgment of the Court of Appeals is founded on the complete fallacy that the verdict of the jury decided that Musgrove had **no** apparent authority because it found he had actual authority. A city clothes a man in a policeman's uniform but does not give him a commission. A jury finds he actually is a policeman. This does not say that he does **not** have a policeman's uniform. The jury found that Musgrove was a general agent **partly** because he did have apparent authority.

It is a cruel injustice for petitioner to lose her jury verdict and to be told that the verdict in her favor bars her forever from having her case tried before any jury.

The jury could and almost certainly did find that Musgrove had both actual and apparent authority. It absolutely did not find that he did not have apparent authority. If the verdict is inconsistent that is reason to set it aside, but no reason to enter a judgment for defendant and bar petitioner from submitting the question of Musgrove's apparent authority to a jury.

## CONCLUSION.

The Court of Appeals has refused to apply the scintilla rule, in this diversity case, thereby depriving petitioner of the trial by jury to which she would have been assured in

the state court. This Court has recognized that the different Courts of Appeal are in conflict in answering the important question of whether a federal court in a diversity case should apply the state or a federal test of the sufficiency of the evidence. The holding of this Court of Appeals that it need not follow the state test is erroneous. The conflict in the circuits should be eliminated, and the injustice to petitioner should be corrected.

The Court of Appeals misapplied the federal test in holding that there was no substantial evidence to support the jury's verdict. It reached this erroneous conclusion by a novel technique that discounted petitioner's evidence and resolved all conflicting inferences in favor of respondent. The technique if approved makes meaningless the guarantee of the Seventh Amendment.

Petitioner was deprived of her rights under the Seventh Amendment in the instant case not only by the holding of the Court of Appeals that the evidence was too insubstantial to support the verdict, but by its further action of refusing to grant a new trial and ordering judgment entered for respondent.

For the foregoing reasons, petitioner prays that her petition for certiorari will be granted.

Respectfully submitted,

.....

FRANCIS HARE,

.....

TRUMAN HOBBS,

Counsel for Petitioner.

**Certificate.**

I hereby certify that a true copy of the foregoing brief has been served upon Messrs. Lange, Simpson, Robinson & Somerville, attorneys of record for respondent, Continental Casualty Company, and I further certify that a true copy thereof has been served upon Messrs. Mitchell & Poellnitz, attorneys of record for respondents, Musgrove Insurance Agency, a partnership composed of W. T. Musgrove and W. R. Cadenhead, and W. T. Musgrove and W. R. Cadenhead, individually.

This the ..... day of August, 1959.

.....

Truman M. Hobbs,
Of Counsel for Petitioner, Mrs. Gladys Leith Holmes.

## APPENDIX A.

Tit. 9, § 68, Code of Alabama, 1940.

Agent's authority as to persons having notice of restrictions upon it.—Every agent has actually such authority as is defined by this title, unless specially deprived thereof by his principal, and has even then such authority ostensibly, except as to persons who have actual or constructive notice of the restrictions upon his authority.

Tit. 9, § 69, Code of Alabama, 1940.

Agent's necessary authority.—An agent has authority: To do everything necessary or proper and usual, in the ordinary course of business, for effecting the purposes of his agency; and, to make a representation respecting any matter of fact, not including the terms of his authority, but upon which his right to use his authority depends, and the truth of which cannot be determined by the use of reasonable diligence on the part of the person to whom the representation is made.

Tit. 9, § 73, Code of Alabama, 1940.

For acts done under a merely ostensible authority.—A principal is bound by acts of his agent, under a merely ostensible authority, to those persons only who have in good faith, and without want of ordinary care, incurred a liability or parted with value, upon the faith thereof.

## APPENDIX B.

In the
UNITED STATES COURT OF APPEALS
For the Fifth Circuit.

No. 17,409.

Continental Casualty Company,
Appellant,
versus
Mrs. Gladys Leith Holmes et al.,
Appellees.

Appeal from the United States District Court for the Northern District of Alabama.

(April 16, 1959.)

Before Rives, Jones, and Wisdom, Circuit Judges.

Rives, Circuit Judge: Appellee, Mrs. Gladys Leith Holmes, as beneficiary, sued the appellant, Continental Casualty Company, for the proceeds of a purported accident and health insurance policy insuring her deceased husband, Oliver Wendell Holmes, while flying as a pilot. She claimed that coverage was in force as a result of an oral binder or oral contract of insurance effected by the Company's agent, W. T. Musgrove, on January 3, 1957, and again on February 20, 1957. Her suit was primarily based on the proposition that W. T. Musgrove, a partner with W. R. Cadenhead in the firm of Musgrove Insurance

Agency, had authority to orally bind the Company. Continental Casualty Company impleaded as third-party defendants the Musgrove Insurance Agency and the two partners individually (appellees here), alleging that none of the third-party defendants had actual authority to make the oral agreement and averred that, if Continental Casualty Company was liable to the plaintiff in this action (such liability being denied) on account of any apparent or ostensible authority, then the third-party defendants are in turn liable in the same amount to Continental Casualty Company.

The trial court submitted the questions to the jury with instructions that if they found the agents to have had either actual or apparent authority to orally bind the Company, the plaintiff would recover, and if they found the authority to be apparent only, then they should also find in favor of the Company in the same amount as against the agents.

The verdicts of the jury were in favor of the plaintiff, assessing her damages at $52,750 and in favor of the third-party defendants. Necessarily, therefore, the jury found that the agents had actual authority to make the alleged oral binder or contract.

Appellant-defendant contends vigorously that there was no substantial evidence justifying submission to the jury on the question of the agents' authority.

The deceased insured, Oliver Wendell Holmes, had prior to 1956 taken out several policies of various kinds of insurance, always using the Musgrove Insurance Agency of Florence, Alabama, to place his insurance. On February 8, 1956, Holmes executed an application for aviation accident insurance for coverage in the sum of $50,000, as a passenger in a certain aircraft, on a form provided by Queen Insurance Company, for which W. T. Musgrove

was agent. Musgrove forwarded this application together with a similar application of James Luther Culver to the Atlanta, Georgia, office of Queen Insurance Company, and this Company, already having considerable exposure under a policy covering the same aircraft, undertook to place this insurance with a friendly competitor, Continental Casualty Company. Mr. Herbert V. Holland, Jr., the representative of the Aviation-Travel Accident Division of the Atlanta branch office of Continental Casualty, was given the information of the two applicants by Queen, and Holland wrote a letter to Musgrove on February 23, 1956, confirming the rates and amount of coverage, enclosing application to be completed and stated that Holmes and Culver both had coverage effective February 17, 1956. This letter appears in the margin.[1] The application was executed by Holmes on February 27, 1956, and forwarded with a letter from Musgrove to Holland on February 29, 1956. The policies were issued and returned to Musgrove.

Upon discovery that these policies did not contain a countersignature by a licensed resident agent of Alabama, Holland telephoned W. R. Cadenhead, Musgrove's

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1 "Oliver Wendell Holmes &
James Luther Culver

"Dear Mr. Musgrove:

"We are holding on binder Aviation Accident coverage for the above-named gentlemen. This provides $50,000.00 Bodily Injury Death and Dismemberment insurance while riding as a passenger in scheduled, non-scheduled, and private aircraft which have Civil Aeronautics Board certification or the foreign equivalent. Each man has $50,000.00, effective February 17, 1956.

"I am writing to ask you to confirm the above and the annual rate per thousand dollars of $1.35. For ease in writing the policies, perhaps you can have the enclosed applications completed and return them to me with your reply. I know that you discussed with Jerry Smith of Royal the possibility of even broader aircraft. If this is desired, I will need to know to what use in what aircraft the men would put the insurance.

"In the meantime, they do have the coverage. Please let me hear from you as soon as possible."

partner, on March 9, requesting that the policies be returned to Atlanta for proper countersignature. There was delay in complying with this request, and on April 11, Holland wrote to Musgrove again requesting a return of the policies for proper countersignature. Upon further delay, Holland wrote Cadenhead on April 30 suggesting that Musgrove be licensed as an agent in Alabama which would allow Musgrove's countersignature to stand. Cadenhead answered on May 3 and gave Holland the necessary information to have Musgrove licensed. Thereafter, on May 7, Holland wrote Cadenhead a general business letter discussing the licensing of Musgrove and the countersignature of the two policies in question. In this letter he attempted to solicit business from the Musgrove Insurance Agency. This letter appears in the margin.[2] Hol-

---

[2] "James Luther Culver
AA-108706

Oliver Wendell Holmes
AA-108707

"Dear Mr. Cadenhead:

"Thank you very much for your letter giving me the information we needed to apply for a Continental license for Mr. W. T. Musgrove. Mr. Musgrove's license has been ordered via our License Department in the Chicago Home Office, and it is my understanding that he should have it in his hands within two weeks.

"I am enclosing the two new policies for the above, which you sent to me. Will you please hold these in your office until Mr. Musgrove's license is received? After that it will be alright (sic) to deliver them to the insureds.

"You have been very kind and patient with us in this matter, and I sincerely appreciate your cooperation. Please be assured that we intend in all ways to honor your Continental licensing, and we want to do as much business with you as possible and help you in all ways. As you doubtless know, the Continental Casualty Company issues more policies for more different types of risks than any other company, and in the Accident and Health business of stock companies, the Continental Casualty Company is larger than the rest, combined.

"This means that we have the equipment, and we certainly hope we have the service to give you what you need. We have many attractive individual and group plans for all kinds of Sickness and Accident insurance. My personal division, Aviation, encompasses

land then had the license request cleared through Continental Casualty's Agents' License Department in Chicago.[3] Musgrove was licensed by the Insurance Department of the State of Alabama on May 24 and this agent's license was forwarded to Musgrove on May 28, 1956.

Musgrove testified that he had a telephone conversation with Holland in February or March of 1956, during which Holland asked permission to apply for a resident agent's license for Musgrove and Musgrove gave the permission. Musgrove stated that they discussed the type of agency and the commission to be paid. Musgrove testified:

> "Q. In that same conversation did Mr. Holland make any statement to you with respect to what kind of an agent he wanted you to be, and that Continental Casualty Company wanted you to be, Mr. Musgrove?
>
> ". . . .
>
> "The Court: What were the exact words he told you?
>
> "The Witness: To be a full agent for the aviation accident division, special risk, department of the Continental Casualty Insurance Company to secure business in Florence, Alabama, and my territory for his company.
>
> ". . . .

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all kinds of specialties and travel risks, and I am always on call to assist.

"You will be hearing from me from time to time in fairly routine ways when I add your name to our special mailing list, and I hope that I shall be hearing from you regularly, too.

"Sincerely yours,

Herb Holland,
"Herbert V. Holland, Jr.,
Aviation—Travel Accident Division."

[3] For this license request, see footnote 14, infra.

"Q. Now during that same telephone conversation, did you and Mr. Holland have a discussion about how much business potentially there was in the North Alabama area?

"A. Yes, sir.

"Q. Did you and Mr. Holland in this conversation discuss anything about what sort of limits that they wanted to write, or wanted you to sell for the Continental Casualty Company in regard to aviation accident policies?

"A. Nothing more than they were the largest writer, and the highest limit, wrote big limits, and wanted it.

"Q. Did Mr. Holland during that telephone conversation make any statement to you in regard to what sort of limits on a policy that you could sell for the Continental Casualty Company, Mr. Musgrove?

"A. No, sir.

"Q. Did Mr. Holland at that time give you any information or advice about to whom and with whom you would do business with the Continental Casualty Company?

"A. Through his department, Herbert V. Holland of the Continental Casualty Company.

"Q. Did he at that time tell you that you would be subordinate to any other resident agent or any other sort of agent for the Continental Casualty Company in the State of Alabama.

"A. No, sir.

"Q. Did you, Mr. Musgrove, have any conversation on that same occasion with Mr. Holland about how you would be paid for the business that you sold for the Continental Casualty Company or not?

"A. Yes.

"Q. Will you tell us what that was?

"A. Full agency commission and to be handled like all my other business, in my business."

After Musgrove received his resident agent's license from Holland on May 28, 1956, these parties had no further contact whatsoever until February 4, 1957.

On December 10, 1956, Musgrove wrote Holmes a letter concerning Holmes' policies in force at that time. Concerning the policy with Continental, this letter stated:

> "Aviation Accident Policy which should be rewritten since you are flying a plane by yourself; this is written on a passenger basis, and not as pilot, but you should have this changed to cover you as pilot of the plane, and I would appreciate your considering this and agreeing to change it. It will cost you more money but will give you the protection that is needed. This policy was charged to Pressure Concrete Company of Florence, and I think in all fairness, and I am sure you agree, that we should transfer this over to your account. Will appreciate very much your discussing this with me the next time we get together."

Musgrove then had a conversation with Holmes on January 3, 1957, and in that conversation Holmes stated he wanted aviation accident insurance on a pilot's coverage basis, and Musgrove told him that he was covered from then on. Musgrove made a notation reading, "Wendell Holmes Aviation Piolit (sic) . . ." and testified that he "went back to the office with it and turned it over to my partner, Billy Cadenhead, for processing and getting the policy endorsed or a new policy issued, whichever was necessary to be done." Musgrove told Cadenhead that Holmes was at that time insured by oral binder. The next day, January 4, Cadenhead wrote Continental Casualty Company, stating:

"Continental Casualty Company.

Re: AA 108707

Oliver Wendall (sic) Holmes

"Gentlemen:

"It is Mr. Holmes wishes to also have pilots coverage under this policy so will you please send us the necessary applications to have completed, or advise us what information you need. I am not sure what kind of plane he is flying, but will secure this for you if necessary."

Thereupon Holland answered Cadenhead on January 7 with the following letter:

"Oliver Wendell Holmes
AA-108707

"Dear Mr. Cadenhead:

"We will be delighted to entertain Mr. Holme's (sic) application for Pilot Coverage. I am enclosing another application which we would like to have him complete and also a Pilot History Form which also must be submitted.

"Depending upon Mr. Holmes experience and needs of the insurance, it is possible that our underwriters would not like to write as much as $50,000 principal sum for piloting. Completion of these two forms will help to determine this. If he should need only $25,000 while piloting, or that is all that could be written, we would be able to reduce the principal sum under the present policy to $25,000. All the present coverage is included in the Pilot Policy, so that he would have $50,000 just as he now has with $25,000 piloting. Of course, this is all problematical.

"Please let me know if I may be of further help."

Some six weeks later, on the night of February 20, 1957, Holmes brought the application and pilot's history form to Musgrove's office. The application had been partially filled out by Cadenhead. In the application was the question, "Do you understand and agree that no insurance will be effective until the policy is issued," and Cadenhead had inserted "yes." Concerning this answer Musgrove testified as to the conversation between him and Holmes:

> "The Witness: . . . I mean he went over these, read, he said, 'Look there, right there,' and I told him—and then is when he questioned me. He said, 'Haven't I been covered since you bound me back there?'
>
> "And I said, 'You have been covered for pilot's coverage.' And he said, 'Well, I have been flying just about every day.' And he said, 'What's this over here?' And I said that the 'Yes' right there wouldn't make any difference, because he was under binder, and it was just a mere formality of getting the document or the policy to him.
>
> "I did not know whether the Continental Casualty Company would indorse it. If they indorsed it they didn't need this application; if they wanted to rewrite a new policy, then they would take this application and rewrite a new policy and this would become a part of the policy.
>
> "And after that Mr. Holmes was satisfied with that, and I reaffirming to him at that time that 'you are covered flying as a pilot.'
>
> "The Court: Is that what you stated to him?
>
> "The Witness: Yes, sir.
>
> "Mr. Cox: All right, now.
>
> "The Court: Did he sign the application or had it already been signed?
>
> "The Witness: No, sir, he signed it that night."

The next day, February 21, Oliver Wendell Holmes was killed while flying as a pilot, and on this date Musgrove had the application forms on his desk.

Cadenhead took the application and pilot's history form to Atlanta on February 25 and there met with Holland. Holland testified that during that meeting and also during a telephone conversation that day with Musgrove while Cadenhead was in Holland's office, neither Cadenhead nor Musgrove made any reference to or discussed the oral binding of insurance as to Holmes. However, Cadenhead testified that he told Holland on this occasion that Musgrove had told Holmes that he was covered and that Holland did not then deny that Musgrove had the authority to bind Holmes.

About a week later, on March 4, Holland made an office memorandum concerning the above meeting and discussing the method of placing pilot coverage. This memorandum is printed in the margin.[4] It had penciled in at the bottom

[4] "Memorandum

"To: File March 4, 1957

"Oliver Wendell Holmes
AA-108708

"Monday, February 25, 1957, Mr. William R. Cadenhead of the Musgrove Insurance Agency, Florence, Alabama, came to see me asking if I had read in the papers that the above policyholder had been killed in an air crash. I was not aware of the tragedy. But I did know about Mr. Holmes' interest in extending his Aviation Division passenger accident policy to include piloting of certificated aircraft.

"Mr. Cadenhead and his employer, Mr. W. T. (Birney) Musgrove, were not approaching us with demands, just to ask advice.

"Here is the chronology of the situation:

"AA-108 policy was issued in early 1956 providing passenger coverage in airworthiness aircraft, our AA-3 program.

"On January 4, 1957, Bill Cadenhead wrote a short letter asking about endorsing the policy to include piloting for Mr. Holmes. I answered that it probably would be difficult, but probably possible, to

thereof: "Activity toward greater Continental production in his agency is greater than ever."

Thereafter, upon a denial of coverage by Continental Casualty Company, this suit followed.

Plaintiff's theory of the case rests upon the authority of the agent to effect a policy of insurance by an oral binder or by an oral contract of insurance, concluding that if sufficient authority existed in the agent Musgrove to bind the Company, it is immaterial for plaintiff's recovery whether the authority be actual (express or implied) or apparent (ostensible). Plaintiff also proceeds on the collateral theory that Musgrove was a **general agent** for the Company, which position automatically gave him the power to orally bind the Company in various ways. In presenting this double-barreled approach, the plaintiff claims that Musgrove had authority whether he is found

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extend the $50,000 principal sum which he already had to include pilot. I said that Mr. Holmes would have to complete a new application and a Pilot History form.

"I heard nothing further until February 25, 1957. However, February 20, 1957, Mr. Musgrove obtained from Mr. Holmes a Pilot History form properly completed and a Special Risks Division tissue application which was to have accompanied the Pilot History form for Aviation Division underwriting. Of course, the application used asked the usual question, which was answered, about no insurance being effective until a policy could be issued.

"Mr. Cadenhead brought these two forms to my office on February 25 and we agreed that there was no binding for any part of $50,000 which Mr. Holmes was trying to place. I told Mr. Cadenhead that our limit for the 150 hours Mr. Holmes' Pilot History form showed is $10,000 and that while I could have bound on the information in the Pilot History form $10,000 pilot coverage I could not have gone higher. I told him that I would have answered these two forms if they had been presented to me for underwriting with an offer to help place the other $40,000 to $50,000 requirement with friendly competitor. I would have offered to bind the $10,000 we might have written if the agent had confirmed in some way.

"Mr. Cadenhead left satisfied.

"Herbert V. Holland, Jr."

to be a general agent or something less, such as a soliciting agent.

Appellant's first and second specifications of error rest upon the refusal of the trial court to grant a motion for a directed verdict made at the close of all the testimony and the refusal to grant a judgment notwithstanding the verdict. In reviewing the latter motion, as well as the first, we must determine if the record contains evidence of "probative facts capable of supporting, with reason," the verdict; for if it does, the verdict must stand.[5] Another similar test to review jury verdicts is that if there is **any substantial evidence** which supports the verdict it must stand.[6] "Substantial evidence" has been best defined by Chief Justice Hughes as follows: "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[7] With these premises in mind, we hold that appellant's first two specifications of error are well taken as there was no substantial evidence that Musgrove had either actual or apparent authority to orally bind Continental Casualty Company.

We state at the outset that the test to determine whether a general agency exists, in both Alabama case law and in

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[5] Myers v. Reading Co., 1947, 331 U. S. 477, 485. See also, Thomas v. Atlantic Coast Line Ry. Co., 5th Cir., 1955, 223 F. 2d 1, 4; Reuter v. Eastern Air Lines, 5th Cir., 1955, 226 F. 2d 443, 446.

[6] Aetna Life Ins. Co. v. Ward, 1891, 140 U. S. 76, 91; Lancaster v. Collins, 1885, 115 U. S. 222.

[7] Edison Co. v. Labor Board, 1938, 305 U. S. 197, 229. While this was an administrative case, the rule stated is applicable as well to jury verdicts.

[8] The general statements following in the body of the opinion are paraphrased from 16 *Appleman, Insurance Law & Practice*, § 8691, p. 401, and are correct statements of both general insurance law and Alabama case law. This section states in part:

> "A great deal of confusion has arisen in the law of principal and agent, in so far as insurance contracts are concerned, by

**general insurance law, is whether the agent "has the power to bind the insurer by his contract of insurance, or to issue**

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the loose terminology employed by many courts. Often, in their desire to find a waiver or estoppel, they have used a double-edged reasoning, stating that because an agent does this and so, he is a general agent, and because he is a general agent, he can do many other things in addition thereto. It is true, as will be shown later, that a general agent can bind the insurer in many ways which a soliciting agent cannot. It is important, however, to find a precise and exact test which will be susceptible of easy application. That test is whether or not the agent has the power to bind the insurer by his contracts of insurance, or to issue policies on his own initiative, or to accept risks, and if the agent has actual authority to do these things, he is a general agent; if he cannot place coverage in effect, but can merely initiate negotiations therefor, he is not a general agent."

[Thus far, we agree wholly with Appleman's text. However, in the following portion, we express some doubt as to the pragmatic statements that a general agent can be created only by actual authority. It seems to us, where the third person relies to his detriment upon the apparent or ostensible authority of an agent and this authority is that normally of a general agent, the agent is, for that transaction, a general agent in the the normal sense of that term and the insurer may be bound through the doctrine of ratification, estoppel, or waiver. However, these distinctions may be based more on legal gymnastics or on semantics than on disagreement of legal principles.]

"It is important not to reason backward in applying such a test. Thus, to take a soliciting agent who can merely solicit applications, deliver policies, or do other acts, and say brashly that he was apparently vested with ostensible authority to bind the insurer by his contract, that the insured was justified in relying thereon, that the agent was, therefore, a general agent, and because of that had the power to bind the insurer by his contracts, is a mere circumlocution of logic which would permit the court in any case desired to find a general agency. A general agency cannot be based upon implied, apparent, or ostensible authority. There must be actual authority to bind the insurer by the issuance of a policy or the completion of a contract. If such actual authority exists, the other powers of a general agent necessarily co-exist upon which the insurer can be bound in other ways. If such actual authority does not exist, the agent is not a general agent, regardless of his ostensible powers, and the insurer could be bound by his contracts of insurance only through the doctrines of waiver, estoppel, or ratification. If this distinction and

policies on his own initiative, or to accept risks, and if the agent has actual authority to do these things he is a general agent";[8] he may then bind the company in other ways, such as by oral contract, by waiving certain policy or application provisions and the like.[10] The general agent whose authority is limited in some way or an agent who is, by certain limitations, less than a general agent may also bind his principal in the above ways as though he were a general agent by apparent or ostensible authority through the doctrines of waiver, estoppel, or ratification, and, of course, the injured party must have relied upon his apparent authority in some way to his detriment.[11] He may also

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definition is borne in mind, and the few decisions which are squarely erroneous are dropped into limbo, little difficulty can arise."

[9] *Ibid.* The test to determine general agency in Alabama law is the same. See Liberty Nat. Life Ins. Co. v. Stagg, 1942, 242 Ala. 363, 6 So. 2d 432; United Burial & Ins. Co. v. Collier, 1931, Ala. App., 130 So. 104, cert. den., 130 So. 106; Robinson v. Aetna Ins. Co., 1901, 30 So. 665, 128 Ala. 477. See, also, Piedmont Fire Ins. Co. v. Pierce, 1944, 245 Ala. 415, 17 So. 2d 133, 136, and Bankers & Shippers Ins. Co. of New York v. Blackwell, 1954, 260 Ala. 463, 71 So. 2d 267.

[10] 16 Appleman, *op. cit. supra.* *E. g.*, See Simpson Sales Co. v. British Gen. Ins. Co., 1952, 257 Ala. 289, 58 So. 2d 591, where a territorial limitation upon the authority of a *general agent* does not bind an insured who has no notice of the agency limitation and deals with the agent to his harm; Piedmont Fire Ins. Co. v. Pierce, 1944, 245 Ala. 415, 17 So. 2d 133, where general agent of fire insurance company waived policy provisions; United Burial & Ins. Co. v. Collier, note 9, *supra*, where a general agent could bind the company by an oral contract to insure; United States Life Ins. Co. v. Lesser, 1900, 126 Ala. 568, 28 So. 646, where a soliciting agent's authority was extended by parol to that of a general agent and he then waived a provision of the policy regarding payment of premium.

[11] 16 Appleman, *op. cit. supra*; United Burial & Ins. Co. v. Collier, note 9, *supra*; Fidelity-Phoenix Fire Ins. Co. v. Ray, 1946, 246 Ala. 425, 72 So. 98; Ray v. Fidelity-Phoenix Fire Ins. Co., 1914, 187 Ala. 91, 65 So. 530; Robinson v. Aetna Ins. Co., 1901, 128 Ala. 477, 30 So. 665; National Life Ins. Co. v. Reely, 1928, 217 Ala. 114, 115 So. 8; Liberty Nat. Life Ins. Co. v. Stagg, 1942, 242 Ala. 363, 6 So. 2d 432, 433.

be less than a general agent (such as a soliciting agent) and have actual authority to bind the company by oral binders or contracts in certain types of insurance.[12]

## I. Actual Authority.

### (a) General Agent.

Therefore, if Musgrove had the power to bind the Company "by his contracts of insurance, or to issue policies on his own initiative, or to accept risks," or if the Company designated Musgrove to be a general agent by some action or manifestation, then he would be a general agent with the power to bind the Company in the manner claimed by Mrs. Holmes. It is elementary that **actual authority** can only be created "by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him to act on the principal's account."[13]

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[12] 16 Appleman, *op. cit. supra.* The typical examples are fire insurance agents. See Tutton v. Liverpool & London & Globe Ins. Co., 1939, 237 Ala. 230, 186 So. 551, 556; Sun Ins. Office of London v. Mitchell, 1914, 186 Ala. 420, 65 So. 143, 145. For a distinction between agents of fire and life insurance companies, see American Life Ins. Co. of Alabama v. Aladdin Temple Ben. Ass'n, 1939, 238 Ala. 512, 191 So. 903, 906. See also Bankers & Shippers Ins. Co. of New York v. Blackwell, 1954, 260 Ala. 463, 71 So. 2d 267.

[13] This basic rule is succinctly stated in Section 26, Restatement of Agency, Second:

§ 26. *Creation of Authority: General Rule.*

"Except for the execution of instruments under seal or for the performance of transactions required by statute to be authorized in a particular way, authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account."

The facts which Mrs. Holmes vigorously insists establish by substantial evidence that Musgrove had authority as a general agent are discussed as follows:

First, Musgrove's testimony as to a telephone conversation in February or March of 1956 where Holland assured Musgrove that he would be a "full agent . . . to secure business", and would receive a "full agency commission," as quoted supra. This is appellee's strongest evidence. However, this conversation took place prior to the issuance to Musgrove of a license by the State Department of Insurance at a time when Musgrove was not an agent of the Company. The term "full agent" can only be reasonably construed as bringing into existence the status of principal and agent or employer and employee, not as conferring general agency powers upon Musgrove.

Second, the agent's certificate or license from the Superintendent of Insurance of the State of Alabama, authorizing Musgrove to act with the powers listed as "Miscellaneous Casualty, including Official Surety Bonds." Summarily, this certificate "is only evidence of the existence of the agency in some form." **American Life Ins. Co. of Alabama v. Carlton**, 1942, 242 Ala. 661, 8 So. 2d 166, 169. See also **Liberty Nat. Life Ins. Co. v. Staggs**, 1942, 242 Ala. 363, 6 So. 2d 432, 433; **American Life Ins. Co. of Alabama v. Aladdin Temple Ben. Ass'n**, 1939, 238 Ala. 512, 191 So. 903.

Third, Plaintiff's Exhibit No. 13, which was a request from the Atlanta branch office to the General Office in Chicago of Continental Casualty Company to license Musgrove as an individual resident agent. Appellee places great emphasis upon paragraph 8 of this request. Paragraph 8 entitled "Applicant will report business through" is answered "Atlanta" as the branch office and "Musgrove Insurance Agency" as the General Agency or Agency. The

pertinent portions of this application are reported in the margin.[14] Holland testified unequivocally that the informa-

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[14]

"Date May 4, 1956

"1. Applicant

"Name Musgrove, William Thomas
(Last) (First) (Middle)

"3. Request (Check appropriate box in each column.)

| | | | |
|---|---|---|---|
| [ XX ] | License | [ XX ] | Individual |
| [ ] | Appointment | [ ] | Corporation |
| | | [ ] | Partnership |
| [ XX ] | Agent | | |
| [ ] | Broker | [ XX ] | Resident |
| [ ] | Special Representative | [ ] | Non-Resident |

"5. State in Which Applicant Is to Be Licensed
Alabama

"6. Lines or Authority of License to Be Issued
(Specify each line of insurance requested.)
Accident and Health

"7. License Status of Applicant (Check all applicable answers. Supply necessary information.)

Applicant: (Complete blanks directly below. Form will be returned if not answered fully.)

[ XX ] Already licensed in state specified in item 5 by reason of an appointment by another Company.

[ ] Already licensed in state specified in item 5 by direct issuance of a license by the Insurance Department.

| | |
|---|---|
| Agent | Accident & Health |
| Applicant licensed as: Agent, Broker, etc. | Licensed to sell what kinds of insurance? |
| No Number 12 31 1955 | Accident & Health |
| License No. Date license issued? | Licensed with what kind of Company? |

tion under paragraph 8 was for the sole purpose of identifying any business produced by Musgrove as belonging to the Atlanta Branch Office, and this request never went out of the offices of the Company and was not known to Musgrove until after this litigation was commenced and was never known to Holmes. However, even had Musgrove known of this instrument, the only manifest purpose of the instrument was a request to license an agent. We agree with appellant that it is without reason to interpret Plaintiff's Exhibit No. 13 as affording the basis of a finding that Musgrove was a general agent of the Company.

Fourth, Musgrove's authority to issue trip accident policies. While Holland testified that Musgrove had authority to issue these individual trip accident policies, the record indicates that he never issued one and did not receive any policy blanks until after February 27, 1957, the date on

"8. Applicant Will Report Business Through
(Complete Home Office and General Agent or Agency
Or Branch and General Agent or Agency)

: Answer fully. This information essential to both the recording and renewal of licenses. Form will be returned if incomplete.

Home Office
Name of Division — Division

Atlanta — Branch Office
Name of Branch

Musgrove Insurance Agency — General Agent or Agency
Name of Agent or Agency

First Nat'l Bank Bldg., Florence, Alabama
General Agent or Agency Address"

which a book of "YBT Travel-Accident Policies" was sent to Musgrove. Even had Musgrove received and made out these policies, it would not be evidence of general agency. These policies required no formal underwriting and would not, of course, have covered flying as a pilot or crew member. We agree with appellant that there is no substantial difference between this type of policy and the policies which can be procured from vending machines in all major airports. This type policy is characterized by the necessity of immediate issuance, and the basic differences between it and a Health and Accident Policy on a pilot for $50,000 for a year are so obvious as to warrant no further discussion.[15]

Fifth, certain correspondence which passed between Holland and Musgrove or Cadenhead. This correspondence has already been set out in this opinion. For instance, see Holland's letter of February 23, 1956, Holland's letter of May 7, 1956, Cadenhead's letter of January 4, 1957, Holland's letter of January 7, 1957, Holland's memorandum of March 4, 1957. Appellee insists that these items of correspondence, either individually or collectively, are substantive evidence of Musgrove's authority as a general agent. Again we do not agree. A careful reading of the letters in the light most favorable to appellee indicates that they have no probative value in ascertaining or indicating Musgrove's authority to act as a general agent, but rather these letters indicate a limited agency.

Sixth, the fact that Holmes was given life insurance as a passenger effected by oral binder from 17th February until the middle of May, 1956. Appellee in brief and in the court below insists that **Musgrove** orally bound the Company for this time and such fact is strong evidence

[15] These trip accident policies can perhaps be compared with certain fire policies where a soliciting agent has authority to bind the company orally or otherwise. See n. 12, *supra*.

of his authority to orally bind the Company on the contract in question. However, the record clearly shows that Holland and not Musgrove bound the coverage as to Holmes and Culver on February 17, 1956, after obtaining the necessary information from Queen Insurance Company and that this was confirmed to Musgrove by letter on February 23, 1956, which also contained the applications. The Company accepted the risk here. Further, Musgrove was not an agent of Continental Casualty Company on February 17, 1956.

Other pertinent facts, which are undisputed, showing the relationship between Musgrove and Continental Casualty Company are briefly as follows. During the period from February 17, 1956, through February 20, 1957, Musgrove or his agency did not have in possession any blank policies providing for aviation accident insurance or blank applications of Continental Casualty Company relating to such insurance, except the two original applications signed by Holmes and Culver and the second application signed by Holmes on February 20, 1957; and during this time, Musgrove handled no insurance business for Continental except those applications above. Holland, who was the only representative of Continental with whom Musgrove dealt, did not have authority from Continental to extend to an agent authority to bind normal aviation accident insurance (except trip policies) and did not have authority to authorize an agent to write policies covering flying as a pilot.

Musgrove did not receive any specific instructions from Holland concerning his agency and had no written agency contract with Continental other than the license issued by the Alabama Department of Insurance.

The undisputed evidence further showed that the underwriting in connection with applications for insurance

of the type involved in this case was done either in Atlanta or Chicago. And it was not the practice during 1956 and 1957 of **any** company writing accident and health insurance in Alabama to give oral binders.

There was also undisputed evidence to show that Musgrove knew that he did not have actual authority to accept risks and make contracts for Continental and therefore was not a general agent. This evidence is: First, the two applications for coverage of Holmes and Culver while flying as passengers (which were sent to Musgrove for the signature of Holmes and Culver after an oral binder had been effected by Holland on the basis of the applications to Queen Insurance Company) contained the same question as the later application for pilot coverage, which was "Do you understand and agree that no insurance will be effected until the policy is issued?" Second, the two original policies issued on the above applications which insured Holmes and Culver while flying as passengers had as a normal policy provision the following:

> "This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the Company and unless such approval be endorsed hereon or attached hereto. No agent has authority to change this policy or to waive any of its provisions."

Third, the application for pilot coverage signed by Holmes on February 20, 1957, stated: "12. Do you understand and agree that no insurance will be effected until the policy is issued?" This was answered, "Yes." Fourth, Musgrove had in his possession a pamphlet from Continental captioned "THIS IS MAX" and relating to policies covering passengers in certain specified aircraft. This pamphlet limited the authority of agents by providing:

"Binding—Regular MAX: No agent has authority to bind coverage. Policies are to be dated effective on the date the issuing office approves application. (See question #12 on app SRZ-1171-B.)"

We also place some emphasis on the fact that Cadenhead, in his letter to Holland of January 4, 1957, merely asked for application forms for pilot coverage and did not mention that Musgrove had orally bound the Company for $50,000, knowing that Musgrove had assured Holmes of coverage. Again, after receiving Holland's letter of January 7, 1957 (which stated, "We will be delighted to entertain Mr. Holland's application for Pilot Coverage" and expressed doubt as to a $50,000 pilot's coverage), Cadenhead did not advise Holland of Musgrove's oral binder of January 3.

We are of the opinion that all of the evidence in this case can only show that Musgrove was merely a "local" or "resident" agent, having the powers normally conferred on a "soliciting" agent with no actual authority to bind the Company by oral contract or binder, and that his actions in assuring Holmes of immediate coverage were clearly without the scope of his actual authority. There were no "written or spoken words or other conduct of Continental Casualty Company which, reasonably interpreted, caused Musgrove to believe that Continental desired him to act on Continental's account as a general agent."[16]

### (b) Soliciting Agent.

Anticipating that the evidence might not meet the requirement of showing a general agency, appellee alternatively alleges that Musgrove's authority as a soliciting agent was broad enough to effect an oral binder of this sort, since

[16] Paraphrased from Restatement, Agency, Second, § 27, note 13, *supra*.

". . . almost all soliciting agents are now given the power of temporary binder to protect the insured while his application is being considered by the company for acceptance or rejection." 16 **Appleman, Insurance Law and Practice,** § 8691, p. 105.

This statement is taken out of context and refers to a fire insurance agent's power to issue ten-day binders which are "more or less automatic, and ministerial in their nature." An analogous power which Musgrove had was the issuance of the individual trip accident policies. However, neither of these even resemble the general agent's power of issuing policies, accepting risks, and other acts involving the "exercise of selection and discretion." 16 **Appleman,** *supra,* p. 105.[17]

## II. Apparent Authority.

The countersuit below instituted against the Musgrove Insurance Agency and the two individuals as partners was based entirely on apparent authority of Musgrove to so act. Again, it is elementary that before a principal may be bound by its agent's apparent or ostensible authority, the person dealing with the agent must have relied on the appearances in some way to his detriment.[18]

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[17] See notes 12 and 15, *supra*.

[18] See cases in note 11, *supra*. Section 27, Restatement of Agency, Second, states:

"§ 27. *Creation of Apparent Authority: General Rule.*

"Except for the execution of instruments under seal or for the conduct of transactions required by statute to be authorized in a particular way, apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him."

See, also, 16 *Appleman, supra,* § 8674.

We agree with the appellant that, "in the case at bar, there was clearly no factual basis for the trial court to submit to the jury the question of apparent or ostensible authority of Musgrove, for the reason that there was no holding out by Continental Casualty Company of Musgrove as an agent authorized to make contracts of insurance." See 2 C. J. S., Agency, § 96, pp. 1205-1206. While the evidence shows that the book of VBT travel-accident policies came into Musgrove's possession after Holmes' death, even if Holmes had known that Musgrove could have issued these trip policies (there was no evidence on this), the policies themselves would have put Holmes on notice that they did not cover a pilot or crew member or anything other than trip insurance. See, **Great American Casualty Co. v. Eichelberger,** 37 S. W. 2d 1050; **Hartline v. Mutual Benefit Health & Accident Ass'n,** 1938, 5th Cir., 96 F. 2d 174.

According to Musgrove's testimony, Holmes twice relied on Musgrove's assurance that he was covered by oral binder, once on January 3 and again on January 20, but this reliance cannot impose liability on the Company as there is a complete absence of actual or apparent authority.

The judgment is therefore reversed and the cause remanded with directions to enter judgment for the defendant. See 28 U. S. C. A., § 2106.

Reversed and Remanded With Directions.

A true copy.

Test:

Edward W. Wadsworth,
Clerk, U. S. Court of Appeals,
Fifth Circuit,

By Clara R. James,
Deputy.

New Orleans, Louisiana
Jun 24 1959

(Seal)

**Judgment.**

Extract from the Minutes of April 16, 1959.

Continental Casualty Company,
Appellant,

versus No. 17409

Mrs. Gladys Leith Holmes et al.,
Appellees.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to enter judgment for the defendant;

It is further ordered and adjudged that the appellees, Mrs. Gladys Leith Holmes and Musgrove Insurance Agency, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.